

PRESIDING OFFICER'S
RULING NO. R97-1/20

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

Postal Rate and Fee Changes

Docket No. R97-1

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PRESIDING OFFICER'S RULINGS ON NDMS MOTION TO STRIKE
FRONK TESTIMONY, NDMS MOTIONS TO COMPEL RESPONSES FROM
WITNESSES FRONK AND CRUM, AND RELATED PROCEDURAL MOTIONS

(September 17, 1997)

This ruling addresses three motions, filed collectively by Nashua Photo Inc. (Nashua), District Photo Inc. (District), Mystic Color Lab (Mystic) and Seattle Filmworks, Inc. (Seattle) (*hereafter*, NDMS).¹ One asks the Commission to strike witness Fronk's testimony on proposed First-Class Mail nonstandard surcharges, based on Fronk's disavowal of any role in the preparation or sponsorship of the supporting cost study.² Another asks the Commission to compel Fronk's response to an interrogatory inquiring into authorship of the main cost study supporting the Service's proposed FCM nonstandard surcharges.³ The third motion asks the Commission to compel a response from witness Crum to an interrogatory inquiring about preparation, oversight and

¹ For convenience and readability, the filings discussed are identified in full in footnotes, but referred to in an abbreviated form in the text.

² August 29, 1997 NDMS Motion to Strike [Specified Portion of] Testimony of Postal Service Witness David R. Fronk (USPS-T32).

³ August 22, 1997 NDMS Motion to Compel Response of United States Postal Service Witness David R. Fronk to NDMS/USPS-T32-16[a-c].

sponsorship of a cost study underlying the proposed residual shape surcharge for Standard (A) Mail, as well as the date the contractor submitted it.⁴

The NDMS motions raise important questions about the Service's practice with respect to library references and the consequences of this practice in terms of the sufficiency of the Service's direct case. A threshold question is the appropriateness of the Service's treatment of the cost studies cited in the NDMS motions as "library references." Another is the Service's contention that the library references containing the support for the proposed surcharges need not be sponsored, at least at this stage of the proceeding. A third question is whether institutional responses suffice as a means of providing NDMS with "a meaningful inquiry" into the studies, as the Service maintains. See Postal Service Reply to NDMS Motion to Compel Fronk Response at 2.

Disposition of the NDMS motion to strike Fronk's testimony is based on the conclusion that the Service's position on the use of library references conflicts with the proper construction of the Commission's rules, and impedes evaluation of the proposals referred to in the NDMS motion in a manner consistent with basic evidentiary standards. The ruling entails two elements. First, it provides the Service with the opportunity to identify, within one week, a sponsoring witness for the material in H-112. The time for discovery (or for allowing the witness identified as the sponsor an opportunity to adopt any responses that already have been provided on an institutional basis) may be extended, as needs dictate. In connection with these steps, the Commission intends to issue a Notice of Inquiry addressing the extent to which the practice identified here extends to other material the Service has identified as library references. Comments responding to this notice may indicate that NDMS's arguments have broader application. Second, based on these actions, the motion to strike Fronk's testimony is denied, without prejudice to renewal.

⁴ August 29, 1997 NDMS Motion to Compel Response of United States Postal Service Witness Charles L. Crum to NDMS/USPS-T28-1(a)-(d) and (f)-(g).

Disposition of the motions to compel is based on the fact that they have been overtaken, for the most part, by subsequent Postal Service filings. Thus, the NDMS motion to compel a response from witness Fronk is denied as moot with respect to all subparts. The NDMS motion to compel a response from witness Crum is denied without prejudice to renewal as to the subparts that raise a sponsorship issue similar to that addressed in the motion to strike Fronk's testimony. The motion is denied as moot with respect to the other subparts identified in the NDMS motion.

Part I. NDMS Motion to Strike Fronk Testimony

Background. Witness Fronk's testimony includes two paragraphs on the Service's proposal to increase the nonstandard surcharge from 11 cents to 16 cents for nonpresorted FCM and from 5 cents to 11 cents for presorted FCM.⁵ Fronk's brief discussion indicates, without elaboration, that the proposed increases are based on new cost data contained in USPS-LR-H-112. USPS-T32 at 24. The introductory paragraph of H-112 indicates that the study is the latest in a long series addressing the added costs of processing nonstandard FCM pieces. It also notes that H-112, among other things, "improves" upon the Docket No. R90-1 study by including new data drawn from another study filed as a library reference in this case. USPS-LR-H-112 at 1-2, citing H-106 (Mail Processing Unit Costs by Shape).

In Interrogatory No. 1 to witness Fronk, NDMS posed a multi-part question about the preparation and sponsorship of H-112. Fronk stated, in response to subparts (a) and (b), that he did not prepare or assist in the preparation of H-112. He also stated, in response to (c) and (d), that he is not the sponsor of the study and is unaware of any witness who is the sponsor.⁶

⁵ Fronk is the Service's FCM rate design witness.

⁶ Witness Fronk responded similarly to NDMS Interrogatory No. 2, which asks identical questions about H-106.

NDMS cites these responses as the basis for its motion to strike the portion of Fronk's testimony that presents the nonstandard surcharge proposals. Motion to Strike (referring to USPS-T32 at 24, lines 3-11). In support of the requested relief, NDMS invokes a number of Commission rules, including several subparts of section 31 (on evidence, library references, and foundational support for studies), section 53 (on the filing of direct evidence) and Special Rule of Practice No. 5 (on the use of and status of library references). NDMS specifically notes that Rule No. 5 provides:

Library references may be submitted when documentation or materials are too voluminous reasonably to be distributed . . .
Library material is not evidence unless and until it is designated and sponsored by a witness.

Id. at 4, citing the inclusion of this rule in P.O. Ruling R97-1/4, Attachment B (August 1, 1997). (Emphasis supplied by NDMS.)

Based on a comprehensive reading of the rules referred to in its motion, NDMS contends that the unsponsored library reference to which witness Fronk refers is not a fair subject for incorporation by reference into his testimony. Moreover, NDMS argues that a witness should not be able to bootstrap otherwise inadmissible documents into evidence and make proposals merely by referring to them, without submitting testimony as to his expert opinion on them. NDSM Motion to Strike at 3.

In opposition to NDMS's motion, the Service asserts that a decision to strike testimony is reserved for extraordinary circumstances, contends that such circumstances do not presently exist, and argues that the motion is, at best, premature.⁷ The Service therefore asks that the motion be denied or held in abeyance. Reply to Motion to Strike at 3.

NDMS, in a reply to the Service's opposition to striking the testimony, contends that the Service is attempting to avoid the issue raised by its motion to strike. It further

⁷ September 9, 1997 Reply of the United States Postal Service to Motion of NDMS to Strike Testimony of USPS Witness Fronk.

contends that the Service's lack of concern over the status of the library reference is based on its hopes of having record evidence introduced, when witness Fronk testifies, through the admission of responses to written interrogatories and responses to oral cross-examination. NDMS Reply to Service's Opposition to Striking Fronk Testimony at 3. NDMS asserts that the Commission should not countenance this approach, because the Service's initial filing contains no cost analysis that could be admitted as record evidence in support of its proposed increases in the nonstandard surcharge, and it has failed to provide a single witness to sponsor USPS-LR-H-112. *Id.*

NDMS also takes issue with the Service's assertion that its motion to strike is premature. Procedurally, NDMS notes the requirement that such motions be filed at least 14 days before the witness's scheduled appearance and its supposition that awaiting an evidentiary proffer would elicit an objection that the motion is too late. NDMS also asserts that *delaying a ruling on the motion would allow the Service to attempt to cure its*

total absence of competent record testimony . . . by hoping that the reference to the inadmissible library reference in testimony, as well as responses to written interrogatories and oral cross-examination concerning the library reference, would all be admitted into the record virtually automatically.

Id. at 5.

Discussion. A plain reading of the rules of practice makes clear that the use of library references is authorized in Commission proceedings primarily as a convenience. Rule 31, for example, associates library references with documents "too voluminous" for distribution and refers to designation of a document as a library reference as a procedure for facilitating reference thereto.

Rules authorizing the use of library references clearly were never intended to provide a mechanism for strategic withholding of key material supporting a proposal or for controlling the timing of its production. Moreover, the Service's insistence that library references "by definition" do not require a sponsor ignores the threshold

question, which is whether a document identified on its face as a library reference is appropriately described as such. In this case, the library reference in issue appears to be one in name only, since it is neither “too voluminous” to distribute nor too difficult to refer to without the designation the Service has given it.⁸

Moreover, the need to sponsor a library reference, assuming it is properly characterized as such, depends on the extent to which a witness relies on it. Generally, the greater the reliance, the greater the likelihood that a witness will be expected to vouch for it.

The Service’s filings in response to the NDMS motions make it clear that its position on sponsorship of the support for its proposals for certain proposed surcharges is at odds with the basic rules of evidence. *See, for example*, Postal Service Reply to NDMS Motion to Strike Fronk Testimony at 2-3, noting that it will respond to cross-examination on the contents of H-112 in a manner consistent with its litigation interest. This impression is reinforced in the Service’s statement, in its objection to an OCA interrogatory to Fronk regarding sponsorship of H-112, that the question relates to “litigation strategy, as opposed to substantive issues in this proceeding.” Postal Service Objection to Certain OCA Interrogatories to Fronk at 1.⁹

However, a motion to strike testimony asks for extraordinary relief, and the Commission generally attempts to achieve a resolution that preserves a witness’s testimony or that allows for other options. This ruling provides an opportunity for the Service to identify a sponsoring witness. If it chooses not to do so, the Commission will evaluate Fronk’s testimony with due regard for the amount of evidentiary support for his surcharge proposals. Thus, the motion to strike Fronk’s testimony is being denied,

⁸ USPS-LR-H-112, entitled “Nonstandard Surcharge Cost Update,” consists of a two-page discussion of background, methodology and results and two exhibits. Exhibit A is a one-page summary drawing on data from other library references. Exhibit B has seven numbered pages and a flowchart consisting of several pages.

⁹ September 12, 1997 Objections of the United States Postal Service to OCA Interrogatories to Witness Fronk (OCA/USPS-T-32-57b, 63a & b, 76b and 106c). The quoted material relates to OCA/USPS -T32-57b.

without prejudice to NDMS's right to refile. In denying the motion, I note that under the circumstances here, I will look with disfavor on an attempt by the Service to defend the nonstandard surcharge proposal on rebuttal by submission of the underlying cost study.

Part II. The Motions to Compel

A. The NDMS Motion to Compel Fronk's Response to Interrogatory No. 16.

NDMS Interrogatory No. 16 (directed to Fronk) asks (a) whether LR-H-112 was prepared by the Postal Service or a consultant; (b) if applicable, the consultant's name and the contract specifications; and (c) the name, title and position of the primary authors of the study. See NDMS/USPS-T32-16. The Service's objection to this interrogatory asserts that it seeks information that is irrelevant and not reasonably calculated to lead to the production of admissible evidence.¹⁰ In particular, the Service claims that H-112's status as the work product of postal employees or consultants, a list of their names, and contract specifications has no bearing on pending issues. However, the Service states that NDMS is free "to continue to direct interrogatories to the Postal Service about the substance of the Library Reference and the Postal Service will respond to them." Objection to Providing Fronk's Response to NDMS Interrogatory at 1.

In its motion to compel a response to the interrogatory, NDMS claims — among other things — that the Service's position could effectively shield the authors of studies, as well as the Postal Service, from cross-examination on information needed to evaluate the basic underpinnings of those studies. Motion to Compel Fronk Response at 2. The Service's Reply reiterates its position that interrogatory No. 16 is irrelevant to substantive issues in this proceeding.¹¹ It nevertheless includes representations that

¹⁰ August 8, 1997 Objection of the United States Postal Service to NDMS Interrogatory [NDMS/USPS-T32-16] to Witness Fronk.

¹¹ August 29, 1997 Reply of the United States Postal Service to Motion of NDMS to Compel a Response to Interrogatory T32-16.

LR-H-112 was prepared by postal headquarters analysts in connection with the Service's Docket No. R97-1 request. The Service resists identifying the specific individuals who contributed to the study (as sought in subpart (c)), but says Fronk "certainly can be questioned concerning his reliance" upon the library reference and that institutional responses would be provided in response to questions about the study, and says that as long as these are provided, NDMS has engaged in "meaningful inquiry into the bases for the study." Reply at 2. The Service also notes that in a separate filing it has transmitted witness Fronk's revised response to No. 16(c), in which he identifies Sharon Daniel as the postal employee with primary responsibility for the study. *Id.*

B. The NDMS Motion to Compel Crum's Response to Interrogatory No. 1.

Postal Service witness Crum relies on library reference H-108 in connection with the Service's proposed Standard (A) Mail residual shape surcharge. USPS-T28 at 10-12. In Interrogatory No. 1 to witness Crum, NDMS asked the same set of questions about preparation and sponsorship of H-108 as it had asked witness Fronk about H-112 and H-106. NDMS also asked several additional questions about the date the *contractor submitted the study and whether Crum had any responsibility for oversight of the study*. In contrast to Fronk's disavowals, these questions elicited an objection from the Postal Service, which asserted that these interrogatories, along with several others, were not reasonably calculated to lead to the discovery of admissible evidence. However, the Service stated: "Witness Crum has answered and remains available to provide answers to questions concerning the library reference and his use of it." Objection at 1.¹² The Service also indicated it took issue with the wording of the NDMS interrogatory, claiming "A library reference, by definition, needs no particular 'sponsor.'"

¹² August 18, 1997 Objection of the United States Postal Service to Interrogatory of Nashua Photo Inc. et al. To Witness Crum (NDMS/USPS-T8-1(a)-(d), (f) & (g)).

Id. In its motion to compel a response to No. 1(a)-(d), NDMS disputed the Service's claim that its inquiries lacked relevance.¹³ In an additional filing, the Service noted that it had made a determination to provide answers from witness Crum to all of the questions subject to the motion to compel.¹⁴

Discussion. Although both of the NDMS motions to compel responses referred to above cover similar ground, the circumstances of each are different. Witness Fronk, for example, has indicated little, if any, familiarity with the study that supports an increase that more than doubles the current nonstandard surcharge for presorted FCM. Witness Crum, on the other hand, has declared himself the main author of the study supporting the surcharge proposal in his testimony, but stops short of acknowledging sponsorship at this stage of the proceeding.

Given that most of the questions the Service initially objected to have been answered in subsequent filings, most do not raise live issues that need to be addressed here. However, two concerns warrant discussion, as they are likely to arise again. One is the Service's contention that the names of the principal authors of studies, whether study is in-house or contractor-supplied, and the terms of the statement of work are irrelevant. This sweeping contention is too broad, since inquiries of this nature may probe legitimate foundational aspects of supporting studies and lead to the production of relevant admissible evidence. The other concern is the delay occasioned by the Service's disjointed production of interrogatory responses.¹⁵ It is generally understood that the press of rate case business precludes optimum coordination, but the Service's

¹³ August 29, 1997 NDMS Motion to Compel Response of United States Postal Service Witness Charles L. Crum to NDMS/USPS-T28-1(a)-(d) and (f)-(g).

¹⁴ September 9, 1997 Response of United States Postal Service Witness Crum to Interrogatory of Nashua Photo Inc., et al. In Lieu of Response to Motion to Compel (NDMS/USPS-T28-1(a)-(d), (f) & (g)).

¹⁵ For example, on September 9, 1997, witness Crum provided responses to NDMS/USPS-T28-19(a)-(d) and (f) and (g), which had been filed more than a month earlier, on August 8, 1997. Similarly, on September 9, 1997, witness Front filed revisions to answers originally transmitted nearly three weeks earlier, on August 16, 1997.

approach to the NDMS motions, apparently inspired by adherence to a questionable view of the role of library references that has been defended as a "litigation strategy," seems to have needlessly interfered with progress on evaluating the Service's surcharge proposals on their merits, which should be a goal in this process.

RULING

1. The NDMS motion to compel a response to NDMS/USPS-T32-16 is deemed moot, and therefore denied.

2. The NDMS motion to compel a response to NDMS/USPS-T28-1 is deemed moot, and therefore denied as to subparts (a), (b)(f) and (g); it is denied without prejudice as to renewal with respect to subparts (c) and (d).

3. The NDMS motion to strike witness Fronk's testimony is denied without prejudice.

4. The Postal Service may identify a sponsoring witness for the material identified in USPS-LR-H-112 within one week.

5. The September 5, 1997 Postal Service Motion for Extension of Time to Respond to NDMS Motion to Strike Portion of Testimony of Witness Fronk is granted.

6. The September 11, 1997 NDMS Motion for Leave to File Reply to the Service's Opposition to Motion to Strike Fronk Testimony is granted.


Edward J. Gleiman
Presiding Officer